IN THE

Supreme Court of the United States,

No. 155.

OCTOBER TERM, 1876.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK

vs.

J. MORRISON HARRIS, ASSIGNEE OR TRUSTEE OF WILLIAM H. BRUNE.

Appeal from the Circuit Court of the United States for the District of Maryland. Filed October 15th, 1874.

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STATEMENT OF THE CASE.

The Bill of Complaint states: (page 1.)

1. That the Complainant is a corporation of the State of New York.

2. That it has its principal office in New York city.

3. That it issued a policy for $20,000 on the life of Mr. Barry in favor of his wife, in January, 1867.

4. That it issued a like policy for $5,000 in December, 1870.

5. That the premiums were paid regularly until December, 1871, and January, 1872.

6. That an assignment was made about the end of 1871 of these policies to Mr. Brune, and then with the consent of all parties *except the Complainant*,—they were permitted to become forfeited with the intent of being re-issued to Mr. Brune.

7. That Mr. Brune signed two *declarations to be made on issuing new policies after lapse*, referring to the original applications for insurance and adopting the same. Copies of the declarations are filed with the bill. (Pages 14 and 15.)

8. That Mr. Barry did not undergo a new medical examination, and there were no other applications for insurance but the original ones, and then Mr. Brune surrendered the old policies and they were cancelled.

9. That two new policies were issued in place of those surrendered, with the same numbers, for the same amounts, and at the same premiums, except that they were changed so as to be payable semi-annually instead of annually, and Mr. Brune paid the premiums on the new policies for six months.

10. That in February, 1872, Mr. Brune assigned to Mr. Whitridge.

11. That Mr. Barry died in March, 1872.

12. That Mrs. Barry on April 4th, 1872, filed her complaint in New York against Mr. Brune and Mr. Whitridge, complaining as just mentioned, and that the novation of the policies and re-issue was not her free act, and that Brune and Whitridge acquired no title to them, and their rights to the policies issued to them are brought into question; and she prays an injunction against the Insurance Company from paying them.

A copy of Mrs. Barry's Bill of Complaint is filed with the bill in this case. (Page 7.)

13. That *all parties agreed* that the money should be paid to the credit of the case, and the Insurance Company be discharged, and accordingly the money was paid on 20th June, 1872.

A copy of the agreement and order of Court thereon, and a receipt for the money, were filed with the bill in this case. (Pages 12, 13 and 21.)

14. That notwithstanding such agreement and payment, Mr. Whitridge on 9th September, 1872, brought suit in Circuit Court of United States in Maryland on the two policies.

Copies of the declarations are filed with the bill in this case.

15. That so the Plaintiff Whitridge would be doubly paid if he gets the money in the New York case and here both; and whatever the result of that case may be, the Company would be compelled to pay the same policies twice; that as Mr. Whitridge consented to the payment of the money in New York he is bound, and as the Complainant freely acknowledges all the facts necessary to enable the Plaintiff to recover, saving only the proceed-

ings in the New York case, it has no adequate and sufficient remedy at law.

Lastly, a perpetual injunction is prayed.

The answer of Mr. Whitridge to the bill in this case admits all the material allegations of the bill, including the payment of the money; but,

(Seventh) sets out at much length the statement of the indebtedness of Mr. Barry to Mr. Brune, and the *assignment* by Mr. Barry of four policies including the two of this Company; and his statement of the lapsing and re-issue of policies is substantially the same as the complainants.

(Thirteenth) says that the agreement was made *without his knowledge or consent*, and that the agreement must speak for itself.

(Fourteenth) that his suits are for separate and distinct causes of action.

(Fifteenth) that his policies are not substitutions or continuations of the originals, and that Mrs. Barry is not claiming the new policies but the old ones which were destroyed, and he calls them *independent contracts*.

He answers the seventeenth interrogatory in the bill saying *he is informed that no order for injunction was passed.*

At the hearing of this case before the Circuit Court, an agreement for the reading of all the papers in the New York case was filed, and the papers were all read, and they were filed by the Court's order and the Judge has so certified, and all these papers are contained in the record as follows:

1. *Mrs. Barry's bill* sets out substantially what is before stated (Record, page 28.) and alleges duress in her assignment, and she alleges that her dividends due on the old policies at the time of the lapse were used in part to pay the premiums on the new policies, and she prays injunction against the Company.

2. *Mr. Brune's answer* (page 33,) was sworn to in Balto. June 27th, and in New York on 29th June, 1872, and filed on or before 1st July, that is, a few days after the money had been paid by the Company as stipulated, which was on 20th June, 1872.

While admitting the other facts alleged in the bill of Mrs. Barry he denies the duress, and sets out the indebtedness of Mr.

Barry to him, and alleges that Mrs. Barry *assigned* to him, and that her *assignment* was voluntary. (Page 35)

Everywhere in this answer the words *assigned, assignment or assignee* are used—they occur *sixteen* times. (Pages .35, 36, 37, 38.)

He alleges "that the two policies issued in January, 1872, as aforesaid, *constitute the only claim on the said Mutual Life Insurance Company on account of insurance on the life of said Barry, and that Plaintiff has no claim whatever to the said policies or either of them.*"

He denies that the Plaintiff is entitled to the judgment demanded by her, but insists that the judgment should be that the complaint be dismissed, and the Defendant Whitridge do collect and receive the amounts due under said policies.

3. *Mr. Whitridge's answer* (page 39) is similar and was sworn to and filed on same days.

He denies the duress and claims under the *assignment* from Mrs. Barry, and concludes by insisting as assignee from Mr. Brune—that the Defendant be adjudged and declared entitled to have and receive the aforesaid insurance money.

4. *The stipulation and order of Court* filed with the bill are contained in the papers filed under the agreement also. (Pages 42 and 43.)

NOTE.—All the foregoing proceedings in the New York case were before the bringing of the suits by Whitridge in Baltimore on Sept. 9th, 1872, and before the Bill of Complaint filed in this case by the Insurance Company in Baltimore.

5. *Now follow certain affidavits* made with a view to set aside the stipulation before made, and pay the money back again to the Insurance Company; the object of which, as shewn in the affidavit of Mr. Harris, was to defeat the application for injunction in Baltimore.

Mr. Harris' affidavit (page 43) says he employed Owen, Nash & Gray, a law firm in New York, to appear in the New York case.

That "*Deponent after this action had been put in issue learned to his surprise,*" that the stipulation had been entered into at

New York and "*he did not approve of the same,*" as it might embarrass his proceedings in Baltimore.

He states also that the Insurance Company had filed their bill for injunction and the motion "*was soon to be brought to a hearing, and it was important that the application to vacate or modify such stipulation should be speedily heard.*"

Owens' affidavit (page 45) says he agreed to the stipulation "considering the suit as in the nature of an interpleader suit, and that the arrangement was such a one as the Court would in that view probably direct, if the said Company should make a motion for that purpose."

Sanford's affidavit (page 45) says his law firm are counsel for Mrs. Barry in New York; that Mr. Harris called on him in New York on 4th April, 1872, being the same day that Mrs. Barry's bill was filed; *that on 13th April, 1872, an order was made restraining the Insurance Company from paying Brune and Whitridge.* That in a letter which he sets out in his affidavit dated 15th April, 1872, *he so informs Mr. Harris* also that cause must be shewn on the 4th Monday of April why such injunction should not be continued during the litigation.

He adds accounts of several interviews with Mr. Harris, and letters to and from him, from one of which it is shewn that the appearance in the New York case was entered for Brune and Whitridge on 11th May, 1872, and Mr. Harris had given the order for it, and the affidavit states that the summons and complaint, affidavit for injunction, injunction order, and order continuing the injunction, were forthwith served on them.

That he Sanford "always regarded the case as equivalent to a bill of interpleader," and he states particularly the circumstances under which the stipulation was agreed upon, and he concludes "that this Court acquired complete jurisdiction of the whole controversy of its subject-matter, and of all the parties thereto, by the commencement of this action, by the injunction order made therein, by the voluntary appearance of all the Defendants, and the service on their respective attorneys of the summons and complaint herein, and also of such injunction order, before any suit whatever was instituted by any one elsewhere in any jurisdiction at all relating to the transactions involved; that as deponent verily believes any other suit relating thereto is wholly unnecessary, if not vexatious; that the Plaintiff has become entitled to

the security afforded by the deposit in the Trust Company of the fund in controversy, and that the withdrawal thereof would impair the interests both of the Plaintiff and of the Defendants, Brune and Whitridge."

Henry E. Davies' affidavit (page 50) states the facts substantially as the others, and says the stipulation was entered into by the Company in good faith and without collusion.

Julien T. Davies' affidavit (page 52) shows that "*Mr. Harris had in his possession on or before 27th June, 1872, and knew the contents thereof, a copy of the order made and entered herein June 20th, 1872.*"

ASSIGNMENT OF ERRORS.

The Appellants assign as errors,

(1.) That the Court refused an injunction.

(2.) That it dismissed the bill:

Because it was entitled to have the bill retained and to some relief in the premises.

POINTS OF ARGUMENT.

1. There is an error in fact in the answer of Whitridge filed 25th Oct. 1872. He says in 17th answer, "*he is informed that no order for injunction was passed.*" (pa. 25.)

Who informed him? Mr. Harris who signed the answer as his Solicitor? Mr. Harris must have known better, for he had in his possession Sanford's letter, of 15th Apl. 1872, that is more than six months before informing him that such order had been passed, and would be continued; and Mr. Sanford states in his affidavit—"the Defendants, Brune and Whitridge appeared herein by Messrs. Owen, Nash and Gray, their attorneys, on the eleventh day of May, whereupon the summons and complaint, affidavit for injunction, injunction order, and order continuing injunction, were forthwith served upon them." (pa. 48)

2. Harris in his affidavit in Oct. 1872, says he learned to his surprise that a stipulation had been entered into, and puts the date "*after this action had been at issue.*" What day is that! The answers of Brune and Whitridge were sworn to in Balto.

on June 27th, 1872, and in New York on 29th June, and were served on 1st July, 1872. (p. 42 and 49)

If this be the date referred to—there seems to be some discrepancy with Julien T. Davies' affidavit. (pa. 52.)

3. But supposing them to be in some way reconcilable—and both be true, then Harris *knew of the order* as early as middle of May, and on 27th June had it in his possession; and it is hardly probable that the New York Counsel had not informed him, for they had a copy of the order on 24th June. (pa. 49.)

And in October—more than three months after he expresses surprise and says he did not approve—and now it will embarrass his proceedings in Baltimore.

4. The Defendant Whitridge must have imputed to him a knowledge of all that his New York Counsel did, and it is a matter of no consequence when his Baltimore Counsel *learned with surprise* of any of the proceedings in New York.

5. The setting aside of the stipulation made on 20th June, an order most proper in itself; by the affidavits filed in October, merely for the purpose of maintaining the suit in Baltimore, *is wholly inequitable.*

6. That the attempt was successful does not alter the equity of the Complainant's bill, in this case, for equity considers that as done, which ought to be done; and the Insurance Company had the right to do the very thing which Whitridge prevented as long as possible in order to gain an advantage by suing in Baltimore.

See the opinion of the Court of Appeals in this very case,
Barry *vs.* Mutual Life Ins. Co., 53 New York, 536.

7. The Circuit Court in Maryland filed no opinion—but said orally that the remedy was by plea in the law case; but when the law case was tried said *lis pendens* was no defence.

If the latter opinion was correct the former evidently was not.

8 In some cases for Injunction, it seems to be held that the Complainant must confess that he is defenceless—that is, admit all facts.

This the bill does in these words, "*and as the Complainant freely acknowledges all the facts necessary to enable the Plaintiff to recover at law.*"—This satisfied the rule.

There was no use in trying the case, it was a tender of the money—equivalent to interpleader so that the Court might have retained the bill and imposed any equitable terms on the Company.

And this view of the case seems peculiarly proper since Mr. Whitridge says in his answer to twenty-fifth interrogatory, (pa. 26,) *that he only claims the sum of twenty-five thousand dollars, and it is indifferent whether it be paid in New York or here.*

This answer was sworn to and filed on 25th October, after the affidavits had been made for the very purpose of compelling the the Company to take back its money.

9. It seems to have been supposed by the Court that the rule of Equity is that the Plaintiff must have *no remedy* at law, before he can come into Equity; but that accords neither with the Statute law of the United States, nor with the decisions of its Judicial Tribunals.

U. S. Statutes, sec. 723.—Suits in Equity shall not be sustained, * * * where a plain, adequate and complete remedy may be had at law.

Same as sec. 16 of Act of 1789.

In Boyce *vs.* Grundy, 3 Peters, 210, held "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and prompt administration, as the remedy in Equity."

In Osborn *vs.* United States Bank, 9 Wheaton, 841,—The Court said—"It will not be pretended that an action at law could not be maintained,"—yet they maintained the Equity Jurisdiction.

In Crane *vs.* McCoy, 1 Bond Circuit Court Reports, 422, held: It is not enough to defeat jurisdiction in Equity that there was a remedy at law; the remedy must be complete, prompt and efficient. If the rights of a party can only be enforced at law, by long continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in Equity, a stringent reason is offered for the application of its power.

At pa. 428—Judge Leavitt says: "Judge McLean on one occasion, within my recollection, strongly stated it, as his opinion, that as a general rule in these conflicts of jurisdiction

involving the right to the title and possession of property, the remedy afforded by a Court of Equity is greatly to be preferred to pretended and vexatious litigations at law."

It that case there *was a remedy at law*, it being a contract about apples, replevied by Sheriff and by Marshal.

The case of Allen *vs.* Watt in Supreme Court of Illinois, decided June 30, 1876, and reported in 2 Law and Equity Reporter, pa. 305—being the No. 12 for September 20, 1876, is an authority for maintaining an Injunction in a complicated case, upon principles applicable here.

10. That an innocent holder of money offering to pay it, ought to be protected against two suits, is clearly equity. Can there be in this case any double liability on these policies of January, 1872, for it is these only that Mrs. Barry claims?

Is it allowable for Mr. Harris to set up in his affidavit in October such a notion—after the express words in the answer of Brune in July as follows?

"And that this Defendant alleges that the two policies issued in January, 1872, as aforesaid,—*constitute the only claim* on the said Mutual Life Insurance Company, on account of insurance on the life of said Barry, and that Plaintiff has no claim whatever to the said policies or either of them."

Is not that the very truth of the matter?

Even if it were otherwise, what have Brune or Whitridge to do with any possible liability of the Company to Mrs. Barry? She claims these very policies and enjoins the Company from paying them.

In McHenry *vs.* Hazard, 45 N. Y., 580, an interpleader case—it was said "He should not be subjected to the expense and hazard of defending two suits."

Is not that the precise condition of the Ins. Co. here? It was entitled to interplead—and entitled to that in the New York case, because that was the first commenced, and that Court first acquired jurisdiction of all the parties and the whole subject-matter of litigation between them.

The case in 53 N. Y. between the same parties, and on the facts of this very case binds them all, and is quite conclusive that interpleader will lie.

But if further authority were needed. See Spring *vs.* South Car. Ins. Co., 8 Wheaton, 268, and Story's Equity, 886, 887 and 889.

11. The notion of *lis pendens* at the end of the answer (p. 24) is not sound equity doctrine.

It is to be observed that *two* authoritative *judgments* of a Court having jurisdiction over all the parties had been passed; viz: 1st. The Company had been enjoined from paying Brune or Whitridge at the very commencement of the suit on 13th April, and this order was *continued during the litigation*. This was an authoritative expression of the will of a Judicial Tribunal to *hold the fund*. It was served on Defendants Brune and Whitridge and they were in the case. See Sanford's affidavit (pa. 48 & 49.)

This was before they brought suit in Baltimore; and their bringing the Baltimore suit was inequitable and not to be tolerated;—for even if they were not by strict injunction order, restrained from suing, the equity and good conscience of the matter is precisely the same. The suits in Baltimore were plainly unnecessary to a fair decision of the rights of the parties, they were *vexatious*. But still more, there stood the other order *of the Court* on the Company to pay the money into Court, and it paid it *before suit brought* in Baltimore.

After Bill filed, Mr. Harris seeks to change the case by vacating that order. If he succeeded, it cannot alter Complainant's case. The Complainant had a good case, the Defendant by his after inequitable acts seeks to make it a bad one Can this be tolerated in a Court of Equity?

The suit by Mrs. Barry in New York against the Company, was to recover the amount of insurance on the life of Barry, her husband, which she averred was claimed by Brune and Whitridge, and she prayed that the defendant Company might be enjoined and restrained from making any payment of such insurance to the Defendants Brune or Whitridge, or either of them, and she prayed the judgment of the Court that she had not been divested of her right and interest under her said policies, she claiming that the second policies issued to Brune in January, 1872, were a renewal of and continuation of the former policies which had lapsed and were then surrendered. She also prayed that it might be adjudged that Defendants Brune and Whitridge had acquired no right or interest in said policies or either of them, and that it might be adjudged that the defendant Company should pay to her the amount due upon said policies. (Page 33.)

Defendant Brune admits that he allowed the old policies to lapse, "*to renew and continue* the insurance on the life of said

Barry in his own name and for his own benefit," page 36, and that said old policies were delivered to the agent of the Company "in order to have them properly and legally *renewed* for the benefit of this Defendant to be thereafter held as security as aforesaid," page 36, and said Brune alleged in his answer "*that the two policies issued in January, 1872, as aforesaid, constitute the only claim on the said Mutual Life Insurance Company on account of insurance on the life of said Barry.*" Page 37. And he claims that the Defendant Whitridge "should have judgment to collect and receive the amount due under the said policies, for the uses and purposes mentioned in the assignment to him above referred to." Page 38. The Defendant Whitridge avers in his answer the old policies in Mrs. Barry's complaint referred to, that the responsibility of the defendant Company by reason thereof, had ceased and determined, that the said policies became void upon the failure to pay the annual premiums thereon, on or before the day or days therein mentioned for such payments, and that said old policies did thereby then and there become and were null and void, page 40, and he claims that he is entitled to have and receive the said Insurance money, and he insists that Mrs. Barry's complaint should be dismissed with costs, and that the defendant be adjudged and declared entitled to have and receive the aforesaid Insurance money and every part thereof. The parties therefore by their pleadings place themselves in the Court of New York as adverse claimants to the same fund, which the defendant Company admitted its liability to pay to whichever of the parties should be adjudged entitled thereto. This position is further confirmed by the affidavit of J. Morrison Harris, the Defendant herein, sworn to on the 3rd day of October, 1872, in which he says, "that the present action was commenced before the expiration of said period on behalf of the widow of said John S. Barry, in the Supreme Court of the State of New York, as an equitable action to adjust the adverse claims of said Plaintiff and of said Brune and Whitridge, to the sums insured by the said Company upon the life of said John S. Barry," Page 44. Mr. Sanford in his affidavit avers, that on the 4th day of April, 1872, the day the action was commenced in the New York Court, he had an interview with the Defendant Harris, who then rpreseented the Defendants Brune and Whitridge, who then expressed "his readiness to negotiate with the Plaintiff on their behalf in regard to the respective claims of the Plaintiff and of said Defendants to the insurance moneys payable under said

policies," Page 45. And on the 15th of April, 1872, Mr. Sanford informed Mr. Harris, that the object of that suit, was to test the questions involved in the conflicting claims of Mrs. Barry and Mr. Brune, Assignee, under the policies. . Page 46. And Mr. Harris, in reply, under date of May 14, 1872, to Mr. Sanford, says: "It is decidedly our mutual interest to adjust these differences, or by actually getting the money avoid them all," and proposing to divide the gross amount due on the policies, as admitted by the Company, [which was $25,000,] and at once close up the matter. Page 48. Mr. Sanford distinctly swears that Mrs. Barry's action was brought for the purpose of determining the conflicting claims of the Plaintiff, and of the Defendants Brune and Whitridge, to the moneys due and payable, and acknowledged by the Mutual Life Insurance Company to be due and payable under the life policies issued by said Company to Defendant Brune; that he, deponent, had always regarded the case to be a bill of interpleader. Page 49 And Mr. Harris avers, that the object in seeking to vacate the order of interpleader of June 20, 1872, and the deposit of money in consequence thereof, was to prevent the issuance of an injunction in this action. Page 44.

First. As between the Company and Mrs Barry, it is undeniable, the old policies had ceased and determined, and were null and void, and that after their surrender and cancellation, no legal liability existed against the Company by virtue thereof. The authorities upon this subject are decisive.

Ruse *vs.* Mutual Benefit Ins. Co., 8 Georgia Reps., 534.
S. C. Bigelow's Insurance Cases, Vol. 1, pa. 83.
Also case between the same parties, 53 N. Y., 536.
Harris *vs.* Equitable Life A. S., N. Y. Supreme Court Reports, Volume 6, Page 108.
Also the decision of this Court in the Southern Policy Cases, decided in October Term, 1876.

It is clear, therefore, that no claim existed against the Company, by any one upon the old policies. The contest therefore, was wholly between Mrs. Barry and Brune, which was entitled to receive from the Company the money which it admitted to be due upon the policies of January, 1872, issued to Brune.

Second. The Court in New York having first acquired jurisdiction of the subject-matter of the controversy between the parties to this action was competent to pronounce final judgment therein, which judgment is binding and conclusive upon all the parties thereto. The parties to this controversy have all had their day in Court and have been fully heard and their respective rights and claims adjudicated. The Court in New York has proceeded to adjudicate upon the rights of these parties and such judgment is final and conclusive, and is entitled to full faith and credit in all other Courts whatsoever.

Mills *vs.* Duryea, 7 Cranch, 481.
Hampton *vs.* McConnell, 3 Wheaton, 234.
McGehay & Co. *vs.* Avery, 30 Vermont, 538.

See also,—

Smith *vs.* McIves, 9 Wheaton, 532.
Stearns *vs.* Stearns, 16 Mass., 171.
Winn *vs.* Albert, 2 Md. Chancery Decisions, 42.
Robinson, Marshal of U. S., 6 McLean's Rep., 355.
Peck *vs.* Jenness, 7 Howard, 612.
Wallace *vs.* McConnell, 13 Pet., 136.
Galpin *vs.* Page, 18 Wal., 350.
Habich *vs.* Folger, 20 Wal., 1.
Dobson *vs.* Pierce, 2 Kernan, 156.

The Court in New York at Special Term, which judgment has been confirmed at General Term, having adjudicated that the policies issued to Brune on the 18th of January, 1872, were to be deemed as between him and Mrs. Barry, a renewal and continuation of those which respectively lapsed on December 9th, 1871, and January 11th, 1872, and that said two policies of January 18th, 1872, were for the use and benefit of the Plaintiff with the same effect as if said original policies had never lapsed, been forfeited, cancelled or surrendered, such judgment is final and conclusive upon all the parties to that action in all Courts and tribunals whatever. Said Court also decided that the Defendants Brune, Whitridge and Harris, respectively received and held the policies of insurance last mentioned, bearing date January 18th, 1872, and said Harris now holds said policies of insurance and the said judgments recovered thereon by said Whitridge in the Circuit Court of the United States for the District of Maryland, charged with a trust in favor of said Plaintiff, to hold the same for her benefit and to account therefor to her. Said Court also

by its judgment, having directed the payment of the amount due on said policies and judgment into that Court, being $30,881$\frac{24}{100}$ which was accordingly paid into Court on the 11th day of October, 1875, correctly decided that such payment should be in full satisfaction and discharge of all claims against the Company, on account of said policies, by either, or any of the parties to that action, and should be and operate *pro tanto*, as satisfaction and payment of said judgment for $27,175, recovered on December 2nd, 1873, on said policies of January, 1872, in the Circuit Court of the United States for the District of Maryland, against the said Company.

(*Note.*) As a matter of fact the sum of $30,881$\frac{24}{100}$, is considerably in excess of the amount of said judgment and interest from December 2nd, 1873, to October 11th, 1875, the date of the payment of the money into the New York Court.

As a matter of argument why the Injunction in this case should issue, it would seem that the argument used by Judge Learned of the New York Supreme Court, General Term, in his opinion delivered when the motion to vacate the order of 20th June, 1872, came on to be heard, ought to be conclusive here. See pa. 142 of Record, in No. 156.

It is plain also that Judge Brady, thought that the parties ought not to be permitted to sue on these policies in Maryland. See pa. 146 of Record, in No. 156.

Judge Barrett's Opinion is equally clear. Pa. 224 of Record, in No. 156.

Judge Van Vorst to same effect.

N. Y. SUPREME COURT.

ROSALIE C. BARRY
Agst.
THE MUTUAL LIFE INSURANCE COMPANY AND OTHERS.

SPECIAL TERM.

"*Van Vorst, J.:*

"Under the pleadings and evidence there is but one liability against the Defendant, The Mutual Life Insurance Company constituting the subject of controversy in this action, and that

grows out of the policies issued to the Defendant Brune, in January, 1872, to take the place of the policies theretofore issued by the Company upon the life of the husband of the plaintiff for her benefit, and which policies, without the knowledge or consent of the Plaintiff, had been suffered to lapse by a designed failure on the part of her husband and Brune to pay the premiums last due thereon, and this with the purpose that they should be surrendered to the Company, and an application made for the issue of other policies for the same amount in their place to Brune, the assignee of the first policies.

"It is true that the Plaintiff's complaint sets up all the facts in regard to the issuing of the policies thereafter surrendered and the payment of the premiums thereon, and the circumstances of the assignment of the policies to the Defendant Brune. But it also distinctly avers that they were allowed to lapse, and the circumstances attending the lapsing are also disclosed.

"The reasons influencing the parties to make default in the payment of the premiums so as to allow them to lapse, are also stated. These reasons were in substance that new policies might be taken out in the name of Brune, the assignee, directly, to take the place of the policies in existence. But the complaint also distinctly alleges that the old policies were surrendered, and that the surrender was accepted by the Company.

"The evidence shows that the old policies were cancelled when the new policies were issued.

"The complaint avers, and the evidence establishes that the new policies were for the same amounts respectively upon the same life with the same annual premiums, and designated by the same numbers as the old. That they were issued to Brune upon an application made by him, in which the husband of Plaintiff joined, for new policies, in place of those lapsed, without any new medical examination of the party whose life was insured, and without any other consideration therefor than the surrender of the old policies, and all claim thereunder, and the payment of the annual premiums fixed at the rate established by the old policies, and that from the time when they were last due and payable by the terms of the surrendered policies, so that there should be no gap or want of continuity in the transaction.

"After stating that the premiums for the current year were paid from the time they had fallen due, in and by the terms of the original policies, by the use, in part, of certain dividends which had accrued to Plaintiff on one of the original policies, and by the

payment by her husband, in cash, of the residue of such premiums on her account.

"The complaint alleges the Plaintiff's demand on the Company for the amount due—the refusal of the Company to pay, on the ground that the Defendants, Brune and Whitridge, claimed the same moneys. The Plaintiff demands judgment that the Company be restrained from making payment to Brune and Whitridge, and that she may recover the amount of the insurance. Also, that it may be adjudged that Brune and Whitridge have acquired no rights under said policies.

"As already suggested, the Plaintiff's claim must rest upon the new policies issued and substituted for the old issues, which were surrendered and cancelled through the failure to pay the premiums thereon by an understanding between Brune and Barry.

"The learned counsel for the Plaintiff, in his argument, claims the amount of these new policies taken out as substitutes for those of the Plaintiff, and which were used by Brune to obtain the new issues. That the Defendants, Brune and Whitridge, understood the Plaintiff's claim to rest upon the new policies issued nominally to Brune, in January, 1872, appears by their answer. Brune, in his answer, alleges "that the two policies issued in January, 1872, as aforesaid, constitute the only claim on the said Mutual Life Insurance Company on account of insurance on the life of said Barry, and that Plaintiff has no claim whatever to the said policies or either of them, or to the sums secured thereby," until the indebtedness of her husband to Brune should be fully paid.

"The Defendant Brune denies that the Plaintiff is entitled to the judgment demanded by the complaint, but on the contrary he insists that the judgment should be that the complaint be dismissed and that the Defendant Whitridge, the assignee of Brune, do collect and receive the amount due on the policies.

"The answer of the Defendant Whitridge makes a similar claim and demand.

"Confining ourselves therefore to the new policies, and the amount agreed and secured to be paid thereby, as the real and true ground of contention between the parties litigating, we find the fact to be established beyond doubt, that the sole consideration for the issue of the new policies proceeded in fact from the Plaintiff, and on her behalf, by the surrender of the old policies, which were her property, and the application of the cash value of dividends earned on the larger, towards the payment of the premiums

for the first year on the new policies and by the payment by her husband on her account of the balance in money.

"We also find that the new policies were in fact issued upon the application made to the Company for the original policies, and the medical examination thereunder, without any new examination: that the premiums were adjusted according to the age of the insured when the application was made for the original policies, as to one of the policies several years having elapsed since such first application was made, such premiums commencing to be paid on the days when the premiums on the surrendered policies were due and payable, and in the future payable on the day limited by the former policies, the new registered by the Company without bearing the same numbers as the surrendered policies. These with other marks of close identity which it is needless to accumulate, show that the new policies are in substance the same as those surrendered and were intended to take their place: that the contract of the Company was one, and was, and is so understood to be: and that the new policies evidence only the original insurance.

"It would follow that Brune having himself paid no new consideration in equity, acquired no right or claim under the substituted policies against the Plaintiff, which he did not have by virtue of the former policies. This consideration appears to be sustained by several adjudged cases.

Dutton *agt.* Wilmer, 52 N. Y., 313.
Norwood *agt.* Guerdon, 60 Illinois, 253.
Chapin *agt.* Fellows, 37 Conn., 132.
Lemon *vs.* The Phœnix Life Ins. Co., 38 Conn., 294.

"The evidence fully justifies the conclusion that the suffering the old policies to lapse was part of a scheme formed by the Defendant Brune, with the agent of John S. Barry, the Plaintiff's husband, the better to effect in Brune the legal title to the insurance already effected on the life of Barry for his wife's benefit, to her ultimate exclusion and injury.

"Such scheme was resorted to by them without the knowledge, concurrence or consent of the Plaintiff, to obviate if possible, the legal objections to the title of Brune to the original policies held by him, under the assignments of the Plaintiff, which the Company declined to recognize, and which was in fact illegal and void.

"But the change was nominal only and not substantial. Such means and devices can create no new right in the projector against the party sought to be injuriously affected. A Court of Equity will not allow any advantage to be gained by the party effecting such change in the policies which he had not secured by the said assignment of the original policies. The form is not to be preferred to the substance.

"If Brune could not enforce, to his own advantage, at the expense of the Plaintiff, the original policies which he held by assignment, no good reason can be urged why he should be entitled to money on the substituted policies for which he paid no new consideration.

"And as in the case of this same Plaintiff in this Court against the Equitable Life Insurance Company and Brune and Whitridge, the equitable title to the original policy, notwithstanding the assignment thereof to Brune was adjudged to be in the Plaintiff, and the policy was held to be her property in equity, and payment of the same was adjudged to her; so, upon the facts in this case, it must also be adjudged that the new policies, issued in January, 1872, are equitably the property of the Plaintiff, and that payment of the same should be made to her.

"All the parties interested in this controversy are before the Court, and their respective claims and equities have been presented and duly considered. The fact that the assignee of the Defendant Brune, after appearing in this action and interposing his defence upon the merits by answer, and submitting his case to the consideration and judgment of this Court, commenced an action in another Court in another State against his co-defendant herein, the Mutual Life Insurance Company, to recover upon the new policies, while it may have occasioned unnecessary expense and embarrassment to that Company, furnishes no satisfactory reason why this Court, which first acquired jurisdiction, should not dispose of all the questions involved in this action.

"In fact, it is the manifest duty of this Court to do so. As the Plaintiff was not a party to the suit in the Court in Maryland, her rights have not been adjudicated, nor can they be seriously impaired by the judgment obtained in that action in favor of the Plaintiff therein.

"That this Court having first obtained jurisdiction of the parties to the controversy and the subject-matter of it, should exercise that jurisdiction to a final determination of all the rights

involved, and that its judgment will be respected and can be enforced elsewhere is established by abundant authority.

Gardiner *vs* Ogden, 22 N. Y., 327.
Stearns *vs.* Stearns, 16 Mass., 171.
Winn *vs.* Albert, 2 Md. Chy., 42.
Peck *vs.* Jenness, 7 How., 612.
Galpin *vs.* Page, 18 Wallace, 350.
Habich *vs.* Folger, 20 Wallace, 1.

"The Insurance Company the case discloses has always been ready and willing to pay the amounts of the Insurance upon the life of Barry under the policies in question. The Plaintiff and the Defendant Brune, through his assignee, each make a distinct claim to the money. The claims are conflicting. The claims of the contestants have been presented in this action to be adjudicated. They should now be determined to the end that justice and equity be done, so that further litigation if possible be ended, the Insurance Company be relieved, and the party entitled be adjudged to receive the Insurance money.

"To the moneys covered by the policies of Insurance of January 1872, standing in the name of the Defendant Brune, issued to take the place of and as substitutes for the cancelled policies, neither he nor his assignee have any real interest or claim. It must be adjudged that these policies are the property of the Plaintiff, and that the Defendant Harris holds the same, as well as the judgment recovered thereon, in trust for her.

"It must be further adjudged that the Plaintiff is entitled to recover of the Mutual Life Insurance Company, the sums secured by said policies, and that the Defendants Brune and Harris be enjoined from collecting or attempting to collect, or in any manner to enforce the judgment recovered against the Mutual Life Insurance Company, in the action in the Court in the State of Maryland; and that the payment by the Company of the amount of the policies, with the interest thereon, to the Plaintiff should be deemed, and be *pro tanto* a payment, satisfaction and discharge of said judgment recovered in the State of Maryland.

"The Plaintiff as well as the Defendant, The Mutual Life Insurance Company, should recover their costs in this action, of the Defendants Brune and Harris."

12. If the general doctrine that mere *Lis Pendens* is no plea to another suit between the same parties is carefully to be observed,

it surely has no applicability to such a case as this. What then becomes of the other doctrine oft asserted in the Supreme Court of the United States and elsewhere, that the Court which first gets jurisdiction of the parties and the subject-matter must hold it, and other Courts will respect it?

In all cases of concurrent jurisdiction, the Court which first has possession of the subject, must determine it conclusively.

Smith *vs.* McIver, 9 Wheaton, 532.

In Shelby *vs.* Bacon, 10 Howard, 56, held "There is no principle better settled than that, where two or more tribunals have a concurrent jurisdiction over the same subject-matter, and the parties,—a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other."

In Haines *vs.* Carpenter, 91 U. S., 256, the Court said "The State Courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interference with their proceedings."

This is negatively;—but is not the rule as good if taken affirmatively—viz: so that the U. S. Courts will say that parties shall not be permitted to break through so salutary a rule, but shall be enjoined by the U. S. Courts from using her tribunals, to twice vex litigants where the State Tribunals have already acquired jurisdiction.

In Eyster *vs.* Graff, 91 U. S., 524, it is said "The Court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit."

In that case a mortgagor became bankrupt after foreclosure suit, and before decree; but the decree was held good.

In Gould *vs.* Evansville R. R. Co., 91 U. S., 527, it was alleged, the Court there had jurisdiction of the parties and of the subject-matter of the action," and on pa. 533 and 4—the principles are discussed, and it is said "Except in special cases, the plea of *res judicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation and which the parties, exercising reasonable diligence, might have brought forward at the time."

The particular question there was as to the effect a judgment upon demurrer, and the rule was announced to be the same as upon verdict.

In Lower, et al. *vs.* U. S., 91 U. S., 539, which for was *Mandamus*, the same reference is made to the conclusiveness of an adjudication, and it is said "It was rendered by a Court have jurisdiction of the parties and the subject-matter."

In Gilman *vs.* Ill. & Miss. Tel. Co., 91 U. S., 616, a bill for foreclosure of two mortgages was filed in a State Court, and the Court said "That Court therefore had full jurisdiction as to the rights of all the parties touching both the instruments."

In Lamp Chimney Co. *vs.* Brass & Copper Co., 91 U. S., 661. The question was upon the jurisdiction of a District Court to decree a corporation bankrupt, and the Court said the case was controlled "by the general rule that where it appears that the Court had jurisdiction of the subject-matter, and that process was duly served, *or an appearance duly entered*, the judgment or decree is conclusive, and is not open to an inquiry upon the merits."

In State of Florida *vs.* Anderson, 91 U. S., 684, the State Court had acquired jurisdiction of a litigation about a Railroad, and this Court respected that jurisdiction and assisted it by an Injunction, saying:

"It was in part ancillary to the relief sought there."

French *vs.* Hay, 22 Wallace, 253, is as strong a case as can be imagined to show the authority of a Court, which first gets jurisdiction to hold it and enjoin the parties from proceeding elsewhere.

There French got a decree in a State Court against Hay, and then after removal of the case to the U. S. Court and pending proceedings to vacate it, French took a record of the decree to another State and sued on it. Afterwards the decree was vacated and then the U. S Court enjoined French from proceeding in the State Court.

The language of the Court is very plain:

"The Court having jurisdiction *in personam* had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction, which it might have required to be done or omitted within the limits of such territory."

Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it, until it reached its termination, and the jurisdiction was exhausted. While the jurisdic-

tion lasted, it was exclusive, and could not be trenched upon by any other tribunal."

Speaking of the Prohibition in the Judiciary Act, the Court say: "The prior jurisdiction of the Court below took the case out of the operation of that provision "

Hence it would follow that in this case the New York Court would have a right to enjoin Whitridge from suing in Maryland.

And further, the right course undoubtedly is, for the U. S. to set an example of what ought to be done to prevent a violation of a just rule in regard to Conflict of Jurisdiction, by unhesitatingly using its own strong power to enjoin suitors in its Courts from violating the rule.

Thus, in the present case, when its aid is invoked, it ought to say, the State Court had jurisdiction first, you shall not be permitted to come here, the U. S. will maintain its own jurisdiction, and it will respect that of the State Courts.

See French *vs.* Shoemaker, 12 Wallace, pa. 86,—in which it appears, that after a decree rendered by the Chief Justice in the Circuit Court in Virginia, French attempted another proceeding in the District of Columbia, but the Circuit Court enjoined him, and on appeal to this Court, that order was held to have been just.

In High on Injunctions, sections 44, 47, 57, 58, 59 and 60, are in full accord with the decision in French *vs.* Hay.

Sec. 47. "The propriety of confining litigation to the forum in which it is first commenced, has repeatedly been recognized by Courts of Equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another Court."

Sec. 60. "While, therefore, the Court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process, from instituting suits in other States, which will result in injury and fraud."

And see the cases there cited, particularly the cases of

Dehon *vs.* Foster, 4 Allen, 545.

Vail *vs.* Knapp, 49 Barb., 299.

Great Falls *vs.* Worster, 23 N. H., 470.

From which extracts are made under Section 60 of that work.

In Taylor *vs.* Carryl, 20 Howard, 595, the principal point was whether the admiralty jurisdiction overrides an attachment in a

State Court, and the majority of the Court decided that it did not;—but all the Judges agreed upon the principle, "That when a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and when the jurisdiction of the Court and the right of the Plaintiff to prosecute his suit, has once attached, that right cannot be arrested or taken away by proceedings in another suit."

Many cases are cited.

Harmar *vs.* Dennie, 3 Pet., 292.
Peck *vs.* Jenness, 7 Howard, 612.
8 " 107.
14 " 52, 368.
Pulhman *vs.* Osborn, 17 Howard, 471.

Much comment was made on Hagan *vs.* Lucas, 10 Pet., 400, in which the question was whether the Marshal might take slaves, which the Sheriff had before taken and delivered to a claimant who gave a refunding bond.

In that case, the Court had been unanimously of opinion, that the forthcoming bond held the property in the jurisdiction of the State Court, and so the second suit was a nullity.

Chancery cases are cited by

Evelyn *vs.* Lewis, 3 Hare, 472.
5 Madd., 406.
Noe *vs.* Gibson, 7 Paige, 713.
Russell *vs.* East Anglien R. Co., 3 McN. & Gord., 104.

The Chief Justice Taney in delivering the dissenting opinion of himself and others, in Taylor *vs.* Carryl, recognizes the general rule—and says, page 607, "That between Courts of concurrent jurisdiction, the Court that first obtains *possession of the controversy*, or of the property in dispute, must be allowed to dispose of it finally, without interruption from the co-ordinate Court."

And this rule applies where the concurrent jurisdictions are two Courts of the United States, or Courts of a State, or one of them the Court of a State, and the other the Court of the United States."

A question was made in the present controversy, about the jurisdiction of the *subject-matter*, and it was supposed by defendants in error—that it must be *in rem.* only. This is not strictly correct.